No. 14-1146

IN THE

Supreme Court of the United States

TYSON FOODS, INC.,

Petitioner,

v.

PEG BOUAPHAKEO, ET AL., individually and on behalf of all others similarly situated,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

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BRIEF FOR DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae DRI—The Voice of the Defense Bar is an international organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system fairer, more consistent, and more efficient.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to its membership, their clients, and the judicial system, including a number of cases raising important issues concerning class-action practice. *See, e.g.*, *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013); *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541 (2011). DRI's members regularly must defend their clients against proposed class actions in a wide vari-

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[1] The parties' blanket consents to the filing of *amicus curiae* briefs are on file with the Clerk. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

ety of contexts, including the type of wage-and-hour litigation that this case exemplifies.

Too often, those proposed classes are certified even though they fail to satisfy the generally applicable requirements of Fed. R. Civ. P. 23, or the more specific requirements of statutes like the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.*, for adjudicating the claims of many different persons at once.[2] And once a class is certified, the stakes change dramatically, as defendants' potential exposure increases in direct proportion to the large number of claims to be adjudicated. Erroneous appellate decisions approving class certification have lasting effects on class-action defendants and their counsel, including DRI members: they increase not just the *number* of erroneous certifications, but also the *threat* of erroneous certification, and the attendant cost and settlement pressure. As cost and settlement pressure increase, there are fewer and fewer opportunities to correct those errors in class-certification law. DRI thus has a strong interest in ensuring, to the best of its ability, that erroneous class-certification decisions like the one now before the Court are corrected, and that the Court's guidance to the federal judiciary in this case prevents similar mistakes from being made in the future.

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[2] Damages class actions under Rule 23(b)(3) and collective actions under FLSA § 216(b) "are fundamentally different" in certain respects, including that persons do not become parties to collective actions unless and until they opt in by "filing written consent with the court." *Genesis Healthcare Corp.* v. *Symczyk*, 133 S. Ct. 1523, 1529-30 (2013). Because the FLSA collective action here is a subset of the putative Rule 23(b)(3) class, the focus of this brief is on the Rule 23 class action issues.

SUMMARY OF ARGUMENT

In this case, the court of appeals held, over strong dissent, that respondents' claims under the FLSA and Iowa's state-law counterpart to it could properly proceed as a class action, to trial and eventually a seven-figure judgment in plaintiffs' favor. But that judgment was not based on any common evidence concerning how much unpaid overtime the class members are owed in the aggregate. Instead, the aggregate unpaid overtime was computed based on evidence about how much unpaid overtime the statistical "average" worker at a particular plant is owed. Much like the "reasonable person," however, the "average" worker is not a real worker, but merely a fictional construct meant to simplify the task of deciding a real case about real people. *Cf.* O.W. HOLMES, JR., THE COMMON LAW 51 (1881).

Of course, there are limits on the extent to which such devices can be usefully or fairly applied. This case demonstrates those limits. Here, the lower courts allowed respondents to rely on the power of averaging and extrapolation to dissolve critical differences distinguishing the individual claims of the various class members, including differences that resulted in many members of the class—as many as 700 out of roughly 3,000—being entitled to no overtime pay whatsoever. Had the class members sued petitioner individually, it could have answered their claims by pointing out these types of weaknesses for individual claims, thereby reducing its exposure. But instead of litigating against a class of real people asserting real claims, petitioner was forced to rebut the claims of some fictional everyman, whose "damages" were then extrapolated to the entire class. The result

may well have been more efficient than requiring individual trials with individualized proof, but it was manifestly less fair. And courts at the class-certification stage are not allowed to opt for one over the other, just as the class-action procedure is not allowed to violate defendants' substantive rights or their due-process right to present every available defense. The decisions of the lower courts in this case went far outside these bounds.

Ultimately, the lower courts' error stems from the potent appeal of resorting to averaging and statistical extrapolation as a substitute for the true commonality on which properly certified class actions depend. Averages hold out the promise of a greatly simplified proceeding, one that seemingly will generate an answer for thousands if not millions of claimants in one fell swoop with just some documents, arithmetic, and maybe an expert or two to explain it all to the judge or jury—a tempting prospect for courts confronted with purported class actions, which have a well-known tendency to prove unwieldy. But as this case shows, the problems with averages are manifold: not only do they effectively deny defendants their ability to assert real defenses, they may also allow class members with worthless claims to recover and enable plaintiffs to manipulate the amount of damages by manipulating the sample on which the average is based.

The Court took this case to decide whether statistical averaging and extrapolation techniques can obliterate differences among class members' liability and damages, including whether certain class members have been injured at all. It should answer the questions presented in the negative, by sharply circum-

scribing (if not outright prohibiting) the type of statistical "proof" that satisfied the lower courts here.[3]

ARGUMENT

I. Rule 23 Demands That Class-Certification Decisions Pay Respect To Both Efficiency And Fairness

As this Court has repeatedly instructed, class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 133 S. Ct. at 1432 (citation omitted); *Wal-Mart*, 131 S. Ct. at 2550 (same). Rule 23(b)(3) classes, like the state-law class that respondents requested here, are particularly exceptional, intended as "an 'adventuresome innovation,' ... for situations 'in which "class-action treatment is not as clearly called for."'" *Comcast*, 133 S. Ct. at 1432 (citations omitted). For that reason, Rule 23(b)(3) imposes additional requirements not demanded for other types of class actions—predominance and superiority—that are meant to ensure that certification will in fact "achieve economies of time, effort, and expense," but "*without* sacrificing procedural fairness." *Amchem Prods., Inc.* v.

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[3] The two questions on which this Court granted certiorari—whether classwide liability and damages may be proved by extrapolation from a statistical sample, and whether a class properly may be certified if it contains hundreds of members who were not injured—are intertwined. Lack of injury to certain class members is one important type of "[d]issimilarit[y] within the proposed class" that averaging techniques like respondents' tend to blur. *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted). This brief therefore largely focuses on the first question.

Windsor, 521 U.S. 591, 615 (1997) (citations omitted and emphasis added).

Efficiency thus cannot be the overriding consideration at the class-certification stage, because efficiency comes at a cost to fairness. Procedural streamlining always has its constitutional limits, and the risk that efficiency will come at the expense of fairness is heightened in class actions. *See, e.g.*, S. Ghoshray, *Hijacked by Statistics, Rescued by Wal-Mart v. Dukes: Probing Commonality and Due Process Concerns in Modern Class Action Litigation*, 44 LOY. U. CHI. L.J. 467, 499-500 (2012) (Ghoshray). The need to balance efficiency and fairness requires courts to "take a 'close look' at" the proposed class before certifying it. *Comcast*, 134 S. Ct. at 1432 (citation omitted).

Fairness and related notions of due process generally demand that parties be allowed an adequate opportunity to present relevant facts and circumstances bearing on the claims and defenses at issue. The American system of civil justice includes a "deep-rooted historic tradition that everyone should have his own day in court," *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989) (quoting C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1st ed. 1981)), that provides all parties with "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). For defendants, the same principle "requires that there be an opportunity to present every available defense." *Lindsey* v.

Normet, 405 U.S. 56, 66 (1972) (quoting *Am. Sur. Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932)).

Efficiency, however, often requires that there be some limit placed on the volume of information the parties will be allowed to develop, lest the litigation completely exhaust their (and the court's) scarce resources. That is especially true in class actions. This Court previously has remarked on "[t]he inherent tension between representative suits and the day-in-court ideal." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 847 (1999). If the class comprises hundreds or thousands of members, then not all of them can practicably testify about the circumstances by which they were injured and how severe their injuries allegedly are, nor is it feasible for defendants to present individualized evidence refuting their individual claims one by one. *See* Ghoshray 498-99 (class trial "does not ... allow the defendant a reciprocal opportunity to defend against each absent class member"). And Rule 23 contemplates no such undertaking. Instead, what Rule 23 calls for is "a truly representative suit" where the claims of one or a small group of typical representatives serve as a stand-in for the claims of all the other class members. *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 550 (1974). The idea is that, by proving (or failing to prove) their claims to the jury, the representatives will simultaneously establish (or fail to establish) every class member's entitlement to relief, thus conserving both the parties' and the court's resources. *See Wal-Mart*, 131 S. Ct. at 2551 (considering whether class members' claims "depend on a common contention" so that all claims "can productively be litigated at once," and "re-

solve[d]" "in one stroke"); *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979) (*Yamasaki*).

This "inherent tension between representative suits and the day-in-court ideal" can be resolved, and both values accommodated, only in those exceptional cases where the class members' claims all "depend upon a common contention" that is "capable of class-wide resolution"—*i.e.*, a contention that can be established or refuted as to every class member using identical evidence. *Wal-Mart*, 131 S. Ct. at 2551. By contrast, where important "[d]issimilarities" divide the class members' claims, *id.* (citation omitted)—such as where "differences in the factual background of each claim will affect the outcome of the legal issue" in play, *Yamasaki*, 442 U.S. at 701—there is no way for the court to harmonize Rule 23's competing demands for both efficiency and fairness. At best, only one of those goals can be achieved in such situations. If individual issues are entertained, a common proceeding becomes unworkable. Or if (as is more likely) the court concludes that "the discrete components of the class members' claims and the [defendants'] defenses must be submerged" in the name of an efficient common trial, it will effectively "rework[ ]" the defendants' substantive rights and duties, and also deprive them of their right to present every available defense to each class member's individual claim. *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

Neither result is acceptable under Rule 23. As this Court recognized in *Amchem*, the drafters of Rule 23 meant for certified class actions to achieve *both* efficiency *and* fairness, not for one to be sacrificed on

the altar of the other. *Amchem*, 521 U.S. at 615; *see also* Fed. R. Civ. P. 23(b)(3) advisory committee's note (1966). Unless the district court is convinced, after performing the "rigorous analysis" Rule 23 requires, *Comcast*, 133 S. Ct. at 1432, that certifying the case for class-action treatment will assure the achievement of both aims, the proper course is to deny class certification.

The lower courts in this case deviated from that course and instead, as explained below, allowed "Trial By Average" to trump fairness, presumably so that the disparate claims of thousands of workers could be more efficiently resolved at once. That result pays no respect to Rule 23 or its objectives.

II. Allowing Statistical Averages To Dissolve The Differences Among Individual Class Members' Claims Impermissibly Trades Fairness For Efficiency

The Rule 23(b)(3) class in this case sought to aggregate the state-law claims of some 3,000 employees of petitioner's pork-processing plant for unpaid overtime, allegedly resulting from unpaid time that employees allegedly spent donning and doffing protective equipment and transiting between their lockers and the production floor. The Rule 23(b)(3) class claims were brought under Iowa's analogue to the FLSA, but no one disagrees that the plaintiffs' prima facie case is the same under both statutory schemes (*see* Pet. App. 5a n.2, 55a-56a): to hold his employer liable, a plaintiff must prove "that he performed work for which he was not properly compensated." *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680,

686-687 (1946). While in some cases (those in which the employer's time records are inadequate or incomplete) plaintiffs are allowed a bit of leeway in trying to establish the *amount* of damages, *id.*, their obligation to prove "the *fact* of damage"—*i.e.*, that the employer failed to pay for work performed—is unwavering. *Id.* at 688 (emphasis added).

To merit class certification, then, it was respondents' obligation to prove, not just assert, that the claims of all 3,000 workers can be resolved "in one stroke" using identical evidence. *Wal-Mart*, 131 S. Ct. at 2551. Put another way, respondents were required to show that some common proof would allow the jury easily to answer the following question for each and every one of them: did this person perform any work for which petitioner owes him or her compensation?

One would think, given the factual basis of the claims here, that respondents' task at class certification would prove daunting, if not impossible. After all, whether any class member "performed work for which he was not properly compensated" by donning, doffing, and walking to and fro depends on a host of variables, all of them highly individualized. What type of protective equipment does she wear—if any? How long does it take her to put it on or remove it? Has her speed in donning and doffing increased over time with practice? How far is her locker from her work station on the production floor? How many paid hours did she actually log during the relevant pay periods?

As might be expected, these questions (and others) have very different answers for many if not most of

the class members. *See* Pet. Br. 30-31. That was reflected in, among other things, the large degree of variation observed by respondents' expert when conducting the time study that respondents relied on below: some workers took only seconds to don and doff, while others took upwards of five to ten minutes or more. Pet. App. 137a-138a. Indeed, the evidence showed that hundreds of class members had not even worked enough hours per week to be entitled to any overtime, irrespective of the time they allegedly spent donning and doffing, and that hundreds more had no more than *de minimis* (and thus non-recoverable) damages. *See* J.A. 415; Pet. App. 22a (Beam, J., dissenting).

No matter: respondents still got their Rule 23(b)(3) class certification, and a nearly $3 million judgment to boot—divided among 3,000 class members, including (presumably) those who should have received nothing. And all that was needed was some simple arithmetic. Respondents' expert simply computed the average amount of time class members in different parts of the plant spent on donning, doffing, and related activities, based on the observations recorded during the time study, and then applied those average times to the entire class. Respondents' damages calculation concededly assumed that all class members spent the same amount of time donning, doffing, etc., as the hypothetical "average" worker derived from the time study; that assumption is plainly false, as shown by the range of times observed during the study, which exhibited "a lot of variation," as respondents' expert readily conceded. J.A. 387. Nevertheless, it did enable the class claims to be tried efficiently and expeditiously to a single jury—at the cost

of petitioner's right to challenge the validity of hundreds of the claims leveled against it.

That result cannot be reconciled with this Court's cases, Rule 23, or the Rules Enabling Act. Those authorities all make plain that the "Trial By Average" upheld here has no place in a courtroom.

A. This Court Has Held That "Trial By Formula" Is Not Permitted Under Rule 23 And The Rules Enabling Act

In *Wal-Mart*, this Court instructed that the class-certification inquiry should focus on whether there is sufficient commonality—not just in terms of the legal claims involved, but also in terms of how they will be adjudicated—"to believe that all [the class members'] claims can productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551. Central to that examination, the Court also said, is whether there are "[d]issimilarities within the proposed class [that] ... have the potential to impede the generation of common answers," the whole point of the class-action procedure. *Id.* (citation omitted).

That was the case in *Wal-Mart*: each of the class members there alleged that her supervisor exhibited a pattern or practice of discriminating against her on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *See* 131 S. Ct. at 2547, 2552. But one form of class relief sought was backpay, a necessarily individualized remedy, which the employer has the right to contest by showing that, regardless whether a general pattern or practice was established, an "individual applicant was denied an employment opportunity for lawful reasons." *Id.* at 2561.

Unlike the decisions below, this Court did *not* decide that those defenses should be limited for expediency's sake. Instead, the Court aimed for the result that would best honor Rule 23's twin objectives of efficiency and fairness. And so, confronted with a plan to "replace [normally required individual] proceedings with Trial by Formula," *i.e.*, extrapolating the defendant's classwide backpay liability from the results of a sample set of claims that would be tried to a master, the Court flatly rejected that "novel project" as inconsistent with the Rules Enabling Act, 28 U.S.C. § 2072(b), because it would deny the defendant its right "to litigate its ... defenses to individual claims." 131 S. Ct. at 2561. *Wal-Mart* thus disapproved efforts to gloss over "[d]issimilarities" between class members on liability issues by using statistical extrapolations or averages to hide them.

Comcast extended that principle to damages issues, holding that where damages are tried on a classwide basis, the measure of damages must track the class's theory of liability; the damages awarded to the class may not be "arbitrar[ily]" based on a statistical model that fails to measure only those losses that are fairly attributable to the allegedly wrongful conduct underpinning the class's claims. *Comcast*, 133 S. Ct. at 1433-35. If the class plaintiffs' theory of liability would result in different answers on the damages question for each class member, then their damages are not susceptible of classwide proof and thus cannot be certified for classwide adjudication. Statistical models at best obscure that reality; they cannot change it.

Here, the decisions below upholding class certification under Rule 23(b)(3) violate the teachings of both

Wal-Mart and *Comcast*. In essence, what the decisions below endorse is "Trial By Average." The Eighth Circuit disagreed that the procedure employed here constituted the type of "Trial By Formula" that *Wal-Mart* condemns. Pet. App. 10a-11a. But what is an average *if not* a formula? And as employed here, it had the identical pernicious effect as the procedure this Court disapproved in *Wal-Mart*: depriving petitioner of its right to present individual liability defenses to the real claims of individual class members being leveled against it. *Comcast*, 131 S. Ct. at 2561. In doing so, the class-trial procedure employed here effectively "abridge[d] ... [petitioner's] substantive right," while "enlarg[ing]" those of the hundreds of undamaged class members who stand to receive monetary awards as their share of the judgment, all in violation of the Rules Enabling Act. 28 U.S.C. § 2072(b). At the same time, petitioner lost its due-process right to "an opportunity to present every available defense." *Lindsey*, 405 U.S. at 66.

The decision below runs equally afoul of *Comcast*. Like the plaintiffs in *Comcast*, respondents here set out to try the issue of damages to the court on a classwide basis, rather than reserving that issue for later individualized proceedings. And like the plaintiffs in *Comcast*, respondents here proposed to try damages using a "model" that did not even try to measure the actual damages—and no more—attributable to respondents' theory of the case. *Comcast*, 133 S. Ct. at 1433. Indeed, the average-and-extrapolate method used by respondents here did not even purport to measure, much less aggregate, the amount of damages allegedly incurred by the actual class members themselves. Instead, respondents'

method assumed that each and every one of them had suffered the same or roughly the same amount of damages as the statistical average worker, and thus multiplied that figure by the number of class members.

Not even in Lake Wobegon would one encounter such uniformity. (At least there, every child is somewhere *above* average.) And in fact, the record discloses, the assumption underlying respondents' calculation is untrue: respondents' experts conceded both that there was significant variation in the time workers spent donning, doffing, etc., and that hundreds of workers (at least) had worked no compensable overtime at all. Pet. 9, 11. In short, respondents' damages formula was not at all tied to the liability case underpinning any actual class member's claim. It therefore was "arbitrary" as a measure of class-wide damages, and respondents' proposal for class certification under Rule 23(b)(3) should have been rejected on that basis. *Comcast*, 133 S. Ct. at 1433.

B. "Trial By Average" Improperly Allows Uninjured Plaintiffs To Recover And Allows Plaintiffs To Manipulate The Amount Of Damages

This Court's class-certification cases have consistently demanded that courts undertake a "rigorous analysis" of whether granting class certification is consistent with Rule 23's requirements. *Comcast*, 133 S. Ct. at 1432; *Wal-Mart*, 131 S. Ct. at 2551; *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160-61 (1982). While advising that "Rule 23 provides [the general] formula for deciding the class-action question," *Shady Grove Orthopedic Assocs., P.A.* v. *All-*

state Ins. Co., 559 U.S. 393, 399 (2010), the Court notably has *not* said what role, if any, *statistical* formulas such as averages should play in a court's class-certification analysis.

Now that the question is before it, the Court should hold that the use of a formula, such as extrapolation from statistical averages, is not an acceptable means of establishing the existence of a "common contention" that binds the putative class claims together, much less of answering that "common contention" on a classwide basis. *Wal-Mart*, 131 S. Ct. at 2551. Indeed, rather than facilitating the necessary "rigorous analysis" to determine whether there are significant "[d]issimilarities within the proposed class" that render certification inappropriate, *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted), averaging techniques like those used here *conceal* those dissimilarities, by smoothing them over until they disappear. Class members with low (or even *de minimis*) damages may be made to appear as if they have substantial claims, and those with no damages at all may be made to appear injured.[4] In doing so, averaging techniques and statistical formulas merely supply a convincing illusion of commonality, which then, all too often, is allowed to substitute for the real thing. And in the process, judicial economy trumps fairness to defendants. *See* Part I, *supra*.

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[4] The unfairness of course can work in the other direction, too, as class members with greater damages—but perhaps still not enough to warrant them opting out and going it alone—are made to appear as if their damages are smaller. *See, e.g.*, Ghoshray 499 (noting that class adjudication "does not allow absent class members to stake claims for injury dissimilar to the representative plaintiff's claimed injuries").

Even worse, formulas and extrapolations like those respondents have relied on here tend to be opaque, inaccessible, and (what is most problematic) easily misunderstood. Because few lawyers and judges (and even fewer jurors) are trained statisticians, the use of flawed statistics leads all of them to draw inferences that the data cannot reasonably support. *See generally* A.L. Phillips, G.M. Phillips, & M.S. Williams, *What's Good in Theory May Be Flawed in Practice: Potential Legal Consequences of Poor Implementation of a Theoretical Sample*, 9 HASTINGS BUS. L.J. 77 (2012). Naturally, the quality of statistical evidence presented in class actions, including wage-and-hour class actions, is not always high, and very often is quite poor indeed, reflecting "an overreliance on summary measures such as overall averages to determine whether class treatment is appropriate." N.D. Woods, *Statistical Analysis and Class Actions: Part 2*, LAW360, May 28, 2015, at 1 (Woods, *Part 2*) ("Too often analyses advanced in support of certification in wage-and-hour class and collective actions fail to critically assess commonality issues in a statistically rigorous manner.").[5]

As a result, statistical extrapolation should not be regarded as a proper basis for the "rigorous analysis" required under Rule 23. At the very least, the proposed use of such techniques to certify a class should trigger a healthy degree of caution and skepticism from the courts.

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[5] This article, as well as the others in the series comprising it, is available here: http://www.edgeworthseconomics.com/experience-and-news/publications/resource:05-28-2015-statistical-analysis-and-class-actions-part-1/.

1. Extrapolating From Average For A Sample Can Obscure Class Members' Dissimilarities, Such As Lack Of Injury

This Court's class-certification decisions instruct federal courts to "rigorous[ly] analy[ze]" the issue of commonality, examining whether significant "[d]issimilarities [exist] within the proposed class [that] ... have the potential to impede the generation of common answers." *Wal-Mart*, 131 S. Ct. at 2551 (citation omitted). Averaging techniques like those employed in this case more often than not impede rather than aid that analysis. As experts recently have commented, specifically in the context of wage-and-hour cases like this one, "it is critical not to be misled by averages that may mask important underlying variability." N.D. Woods, *Statistical Analysis and Class Actions: Part 1*, LAW360, May 27, 2015, at 1 (Woods, *Part 1*). "A simple average cannot necessarily shed light on the experience of any given subset of the [class members] analyzed." *Id.* at 2. The average alone cannot account for the "underlying variation" that may lurk in the population the average is supposed to represent. *Id.* And where that "underlying variation"—the "spread" or "dispersion" associated with the underlying data set, which can be quantified—is large relative to the average, the average is far more likely to mislead than to enlighten when extrapolated to the larger population. *Id.*

Those dangers are on full display here. The "average" uncompensated overtime that supported the damages calculation in this case was drawn from a sample that exhibited what respondents' expert conceded to be "a lot of variation": some workers took

less than a minute to don, doff, etc., while others took five or even ten to perform the same tasks. J.A. 387; Pet. App. 137a-138a. Obviously there would also be some variation as well in the amount of time it took each worker to travel between his or her locker and the production floor, depending on where one's locker is in relation to one's work station. And, the trial evidence also showed, not every worker had the same equipment to don and doff, and not every worker went about those tasks the same way: some continued donning their equipment while on the line, others did not. Pet. Br. 12.

In the end, these myriad variations were set aside entirely: respondents treated every worker as if he or she were entitled to be paid for the "'all-in' average" of either 18 or 21.25 minutes (depending on which floor each worked on), and the jury presumably calculated a seven-figure plaintiffs' award on that basis. Pet. Br. 8-9. That result is doubly flawed. *First*, the judgment shortchanged any workers who may have been entitled to more than this "average." *See Espenscheid* v. *DIRECTSAT USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013); Woods, *Part 1*, at 2 (discussing an example in which 50 employees work 20 hours off-the-clock per week, and 50 more work zero hours per week; the average for all 100 is ten hours per week, which "is clearly not an adequate measure of actual time worked off-the-clock since it misses the mark entirely for both [groups]"). And *second*, at least as problematic, the judgment gave a windfall to those who had worked less—including more than 700 class members who had not logged enough hours to be entitled to any overtime, or whose overtime pay would have been merely *de minimis* (and thus non-

recoverable). *See* Pet. App. 22a (Beam, J., dissenting); *see also Mt. Clemens*, 328 U.S. at 692. Had they brought their cases individually, they should have taken nothing at all, whereas if this Court upholds the judgment, each of those unentitled class members presumably will be entitled to share in it.

Again, the Rules Enabling Act forbids federal rules of procedure, like Rule 23, from "abridg[ing], enlarg[ing] or modify[ing] any substantive right." 28 U.S.C. § 2072(b). One can scarcely imagine a more blatant violation of that rule than allowing a cash award to claimants who are legally entitled to nothing, simply because their claims were brought in a class action. The result also seriously threatens the important limitations that exist on federal-court jurisdiction. Workers who have received all the wages they are due under the law have suffered no injury, in fact *or* in law, that is capable of being redressed by a court; as such, they cannot establish what this Court has referred to as "the irreducible constitutional minimum of standing," "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Consequently, had the hundreds of uninjured workers here tried to bring their cases to the district court individually, each would have been turned away for lack of a justiciable claim. Just as a case's status as a class action cannot alter the parties' substantive rights, it also cannot give standing to the uninjured claimants lurking within the broader class. Rather, "Rule 23's requirements must be interpreted in keeping with Article III constraints." *Amchem*, 521 U.S. at 623; *accord* Fed. R. Civ. P 82.

It offends the Constitution, the applicable statutes, and Rule 23 to allow uninjured plaintiffs to recover simply by being lucky enough to fall within the definition of a certified class. Yet *exactly that unlawful result* follows naturally, if not inevitably, from allowing proof about a fictional "average" employee to stand in for proof about the actual class members. *See Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (holding that damages could not be resolved on a classwide basis by computing lost profits based "on abstract analysis of 'averages'" calculated for a "fictional 'typical franchisee operation'"). By diverting the court's focus away from the actual class members, and how they are similarly or dissimilarly situated, averaging techniques like those used in this case too easily allow uninjured claimants to be smuggled in under the cover provided by the broader class action.

Allowing that to happen relieves plaintiffs seeking class certification of their burden to "affirmatively demonstrate [their] compliance with" Rule 23 by "prov[ing] that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 131 S. Ct. at 2551. And it allows courts to shirk the "rigorous analysis" Rule 23 demands to determine whether "all [class members'] claims can productively be litigated at once." *Id.* Thus, for instance, in *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015), the court upheld allocating *to defendants* the burden of showing that there are more than a *de minimis* number of uninjured claimants in the class; the court thus assumed that classwide extrapolation from an average was proper unless the defendant could prove otherwise. *See id.* at 28. At the

same time, extrapolations from averages destroy valuable defenses to individual class members' claims, depriving defendants of their due process rights in the name of administrative convenience. *See Lindsey*, 405 U.S. at 66; Ghoshray 498-99 ("[W]ithin the context of sampling, extrapolation allows a non-plaintiff [class member] to enjoy the fruits of adjudication by relying on a representative plaintiff's testimony and construction of causation," but "does not ... allow the defendant a reciprocal opportunity to defend against each absent class member"). The Court should bring an end to the statistical alchemy that enables all of these abuses.

2. Sampling And Extrapolation Can Mislead Decision-Makers Into Awarding Inflated Damages

Even beyond the issue of averaging, there is another problem with the statistical methods that are now commonly used to justify class certification: reliance on improper sampling techniques that distort the overall picture of the class being provided to the court.

Data from a self-selected, biased, or otherwise non-representative sample can tell the court nothing about the population. To draw inferences from a sample about what is likely true about the entire population, the sample must be appropriately representative of the population. *See, e.g.*, Ghoshray 482; N.D. Woods, *Statistical Analysis and Class Actions, Part 3*, LAW360, May 29, 2015, at 2 (Woods, *Part 3*). And for a sample to be appropriately representative, it *must* be randomly selected. *See* Ghoshray 482-83; *accord* Phillips 80. Indeed, even self-described advo-

cates of "Trial By Formula" agree on this much: "Random selection is critical to obtaining a useful sample" that can be fairly extrapolated to the entire class. A.D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 624-25 (2012) (Lahav) ("One must always suspect that any nonrandom method of picking sample cases will be skewed and therefore be an inaccurate estimate of the population average."). Randomness is sometimes difficult to ensure, as both courts and commentators have noted: design errors in the sampling procedure may introduce certain biases, such as non-response bias,[6] that undermine randomness and thus skew the results of the study. *See* Phillips 90-91; *Duran* v. *U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 43 (2014).

Moreover, while randomness is *necessary* for representativeness, not every random sample will *guarantee* representativeness. "Simple random samples[7] assume the presence of a singly reasonably homogenous distribution with relatively little variation around an average outcome. When substantial varia-

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[6] "Nonresponse bias can occur if a sample is chosen randomly from a group containing only survey respondents. The potential for bias arises because those who do not respond have *no* probability of inclusion in the sample. Thus, although the participants are randomly selected from among respondents, the sample will not reflect the characteristics of the members of the population who chose not to respond to the survey." *Duran* v. *U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 43 (2014).

[7] A "simple random sample" refers to choosing one subset of a given size from one larger population, where each individual is chosen randomly and entirely by chance. There are other sampling designs that can be used as well, which can compensate for the limitations of simple random sampling. *See* Woods, *Part 3*, at 2 & n.7.

tion exists in the population studied, a simple random sample ... will lead to estimates measured with too much error." Woods, *Part 3*, at 2. And, where establishing commonality is concerned, "simple random samples are simply inadequate," because their implicit assumptions—that the population exhibits little variation around the average—is precisely what is in dispute and must be proved, making reliance on simple random sampling entirely circular. *Id.* ("For a sample to be useful in the assessment of class certification topics it must allow the analyst to test whether differences exist within subparts of the proposed common class."). As the California Supreme Court recently observed in a landmark class-certification decision, "[a] sample that includes even a small number of interested parties"—such as the self-selecting workers just described—"can produce biased results." *Duran*, 59 Cal. 4th at 43. Moreover, "[t]he impact of this error is magnified when the biased results are extrapolated to the entire population," and "cannot be cured simply by increasing the size of the sample." *Id.* ("When a selection procedure is biased, taking a large sample does not help. This just repeats the basic mistake on a larger scale." (quoting Freedman *et al.*, *Statistics* 335 (4th ed. 2007)).

Here, the time study that respondents used to derive the average that underpinned their liability and damages case concededly did not examine a random sample. Indeed, respondents' expert admitted as much: because the time study openly observed whichever worker was performing a particular activity at the time, the workers themselves could control whether they would be included in the study, by

choosing to perform a certain activity while observed or not. Because the sample produced from the time study admittedly was not random, J.A. 359, there is also no basis for concluding, as the Eighth Circuit apparently did, that it was "representative." Pet. App. 13a. Even those who put great faith in adjudication by statistical inference recognize that such a conclusion is "suspect": "Good social science methods require a random sampling to avoid bias." Lahav 590. Many of the courts that have addressed the issue agree. *See Espenscheid*, 705 F.3d at 774 (suggesting that a non-random sample could turn out to be representative only "by pure happenstance"); *Duran*, 59 Cal. 4th at 43 ("A sample must be randomly selected for its results to be fairly extrapolated to the entire class.").

Averaging always has a powerful ability to conceal class members' dissimilarities, but it does even greater damage to defendants' rights when the average is derived from a biased sample. Extrapolating such an average to the entire class not only gets the numbers wrong for individual class members, but also inflates the *aggregate* amount of damages to the class as a whole. If, for example, the sample from which the average was calculated is skewed, such that it includes a disproportionate number of the most-harmed class members and far fewer of those who have suffered little or none, then of course the average amount of damages computed will be skewed higher as well. *See, e.g.*, Woods, *part 3*, at 2; Phillips 96 (discussing home-defect class action in which plaintiffs' experts extrapolated damages from a sample infected with self-selection bias that resulted in the sample "overestimat[ing] the number defects per

home by more than 25 percent"). And when that skewed average is extrapolated to the entire class, it would likely "result in an astronomical figure that ... bears little or no relationship to the amount of economic harm actually caused by defendants." *McLaughlin* v. *Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008).

Judge Benton thus was fundamentally wrong in opining that the dispute over the use of averaging was just about "how the fund is allocated among class members," a subject in which he thought petitioner "ha[d] no interest." Pet. App. 131a; *see Espenschied*, 705 F.3d at 774. The use of sampling and averaging renders the amount of the final damages number itself suspect, especially as the statistical methods used often are not sufficiently robust. *See* Woods, *Part 3*, *supra*, at 2-3. In such cases, the use of shoddy statistics and an audience—judges and juries—that has not been trained how to spot them effectively allows defendants' liability to be increased beyond what the law allows, merely because the case is proceeding as a class action—indeed, so that the case may be a class action. Allowing the class to recover greater damages than the class members all together have incurred works a further violation of both the Rules Enabling Act and the federal Constitution. *See McLaughlin*, 522 F.3d at 231.

The Court in this case should put an end to class-action lawyers' efforts to use such devices instead of properly proving what Rule 23 actually requires: true commonality among the class members' claims, such that they "can productively be litigated at once." *Wal-Mart*, 131 S. Ct. at 2551. Recent experience with the application of statistical extrapolation—

particularly the brand used by the class-plaintiffs' bar to establish commonality, predominance, and manageability—has shown that in class-certification disputes these techniques tend to harm more than help and mislead more than enlighten. The time has come to strictly circumscribe, if not outright prohibit, its role in the Rule 23 analysis.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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